

JOHN E. WALTON

IBLA 70-529

Decided November 29, 1972

Appeal from decision (Montana 2-68-4(SC)) of Administrative Law Judge L. K. Luoma assessing penalties for repeated and clearly willful trespass upon the Federal range.

Affirmed as modified.

Grazing Permits and Licenses: Trespass--Trespass: Measure of Damages

Where it has been determined that a grazing trespass on the Federal range is repeated or clearly willful, the value of the forage consumed shall be computed and assessed at \$4 per animal-unit month, or twice the commercial rate if such amount is higher. Where the commercial rate is \$4, the assessment of damages shall be at the rate of \$8 per animal-unit month.

Grazing Permits and Licenses: Trespass--Trespass: Measure of Damages

In calculating damages for trespass on the Federal range based upon the amount of forage consumed, whenever fractional animal-unit months are involved, their sum must be rounded upward to arrive at the total number of animal-unit months for which the damages are to be assessed.

Grazing Permits and Licenses: Trespass--Trespass: Generally

Where a grazing licensee with a record of ten trespass violations over a period of three years commits additional violations, all of which are deemed to be repeated trespasses, a reduction in grazing privileges may be imposed and a 20-percent reduction of two years is justified.

APPEARANCES: James A. McCann, Esq., Wolf Point, Montana, for appellant; Garry V. Fisher, Esq., Richard K. Aldrich, Esq., Office of the Field Solicitor, Department of the Interior, Billings, Montana, for the government.

OPINION BY MR. FISHMAN

John E. Walton has appealed from a decision (Montana 2-68-4(SC)) by L. K. Luoma, Administrative Law Judge dated February 26, 1970,

which reduced appellant's grazing privileges upon the Federal range by 20 percent for two years, and assessed damages of \$79.68, for repeated and willful trespasses, allegedly committed during the 1967-68 and 1968-69 grazing seasons, in violation of the Taylor Grazing Act, §§ 1-3, 43 U.S.C. §§ 315, 315(a), 315(b) (1970), as implemented by 43 CFR 4112.3-1(a), and (b) (1972).

The facts are set forth in the Judge's decision, copy attached, and need no reiteration here, except where pertinent to the disposition of the appeal.

The appellant's statement of reasons is largely directed to the assertion that Charles Dunn was responsible for the trespasses.

At the hearing appellant testified that those of his animals which were found in the Dunn-McNabb Allotment had escaped from the King Pasture, where he was licensed to graze (Tr. 132-34). He introduced no evidence to contradict the livestock counts, but contended that the trespasses had been caused by one Charles Dunn, a neighboring rancher who shared control of the private land within the Dunn-McNabb Allotment, which was then a common pasture. Dunn was accused by appellant of having continually opened the gates confining appellant's livestock and chased them into the allotment (Tr. 136-40). Three neighboring ranchers testified to Dunn's reputation as a troublemaker with a propensity for opening gates of other livestock owners, thus causing their animals to be in trespass (Tr. 93-102, 105, 125-26). None of the testimony tended to show, however, that Dunn had caused any of the specific trespasses alleged.

The Judge found that appellant had committed all of the trespasses in the Dunn-McNabb Allotment charged by the government, and assessed damages of \$55.04, at \$8 per AUM, for repeated and willful trespass consisting of unauthorized on the Dunn-McNabb Allotment (46 percent Federal range).

In his appeal appellant does not contest the Judge's conclusion that his livestock were in trespass in the South Penrose Pasture during January 1968, and in the Dunn-McNabb Allotment in September and October 1968, but reiterates his belief that the trespasses found to have occurred in the Dunn-McNabb Allotment were caused by Dunn. Since the evidence with respect to Dunn's purported actions falls far short of establishing the truth of appellant's accusations, we find that the Judge correctly disregarded all testimony attempting to shift to another the responsibility for the alleged trespasses. See John Gribble, 4 IBLA 134 (1971)

Although the appellant asserts that the findings of the Judge are not warranted, we find that they are supported by the record. See State Director for Utah v. Edgar Dunham, 3 IBLA 155, 78 I.D. 272 (1971).

Appellant requests "\* \* \*" that he be ordered no reduction in grazing privileges for his alleged infractions of grazing regulations."

The Judge pointed out that six relatively minor trespasses were committed by the appellant in the years 1950-1953, and ten similar violations in the years 1965-1967 (Ex. G-9). In the circumstances the Judge properly found that the current trespasses were repeated and warranted a finding of willfulness. See J. Leonard Neal, 66 I.D. 215 (1959). The 20 percent reduction in grazing privileges for a period of two years, imposed by the Judge, was not unreasonable. We now turn to the amount of trespass damages assessed by the Judge.

In accordance with the procedure for computation of the applicable number of AUM's as adopted by the Bureau of Land Management and approved by this Board in John Gribble, supra, under which a fractional AUM is rounded upward to the next whole number, damages are properly assessed as follows:

South Penrose Pasture  
(73% Federal Range)

50 horses x .065 mo. (1/23-1/24) x 73% F.R. = 2.37 AUMs  
10 horses x .097 mo. (1/25-1/27) x 73% F.R. = 0.71 AUMs

Total 3.08 AUMs Round to 4 x \$8.00

Total \$32.00

Dunn-McNabb Allotment  
(46% Federal Range)

23 cattle x .167 mo. (9/12-9/16) x 46% F.R. = 1.77 AUMs  
3 horses x .533 mo. (9/16-10/1) x 46% F.R. = 0.74 AUMs  
28 cattle x .067 mo. (9/17-9/18) x 46% F.R. = 0.86 AUMs  
30 cattle x .100 mo. (9/19-9/21) x 46% F.R. = 1.38 AUMs  
11 cattle x .167 mo. (9/21-9/25) x 46% F.R. = 0.83 AUMs  
14 cattle x .033 mo. (9/26) x 46% F.R. = 0.21 AUMs  
11 cattle x .200 mo. (9/27-10/2) x 46% F.R. = 1.01 AUMs  
5 horses x .033 mo. (10/2) x 46% F.R. = 0.08 AUMs

Total 6.88 AUMs Round to 7 x \$8.00

Total \$56.00

Total Damages \$88.00

Accordingly, pursuant to the authority delegated to the Board of Land Appeals, 43 CFR 4.1, the decision appealed from is affirmed as modified.

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Frederick Fishman, Member

We concur:

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Douglas E. Henriques, Member

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Anne Poindexter Lewis, Member

UNITED STATES DEPARTMENT OF THE INTERIOR  
OFFICE OF HEARINGS AND APPEALS  
Hearings Division  
4209 Federal Building  
Salt Lake City, Utah 84111

February 26, 1970

DECISION

JOHN E. WALTON,	:	MONTANA 2-68-4(SC)
	:	
Respondent	:	Violation and Hearing Notices
	:	dated March 12 and
	:	September 18, 1968,
	:	Miles City District

The Acting Montana State Director, Bureau of Land Management (BLM), issued notices 1/ dated March 12 and September 18, 1968, citing the Respondent, Mr. John E. Walton, to appear before a Hearing Examiner of the BLM to show cause why his license should not be reduced or renewal thereof denied and satisfaction of damages made, for allowing livestock to graze on the Federal range without authorization, as follows:

March 12 Notice

In the "Penrose Place" as described in the John Walton 1967 grazing license:

61 horses	1/23/68 through 1/24/68
21 horses	1/25/68 through 1/27/68

Damages alleged - \$40.00

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1/ The notices were purportedly issued under the provisions of 43 CFR 9239.32, which apparently is a misprint in standard form 9230-15 (August 1964). The correct citation is 43 CFR 9239.3-2(e). There is nothing in the record to indicate that Respondent was misled or his rights prejudiced in any way by this error.

September 18 Notice, as amended 2/

Penrose South pasture, as described in the John Walton 1968 grazing license:

13 horses	9/10/68 through 9/13/68
7 cattle	9/10/68 through 9/13/68

In T. 25 N., R. 43 E., Sections 24, 25, 36, and T. 25 N., R. 44 E., Sections 17, 18, 19, 20, 30, 31, 32 (also known as Dunn-McNabb allotment)

23 cattle	9/12/68 through 9/16/68
3 horses	9/16/68 through 10/1/68
28 cattle	9/17/68 through 9/18/68
30 cattle	9/19/68 through 9/21/68
11 cattle	9/21/68 through 9/25/68
14 cattle	9/26/68
11 cattle	9/27/68 through 10/2/68
5 horses	10/2/68

Damages alleged - \$104.00

The notices charged that such unauthorized grazing was in violation of the provisions of the Taylor Grazing Act and the Grazing Regulations, and constituted wilful, grossly negligent and repeated violations of the terms of Respondent's grazing licenses.

A hearing in the matter was held on July 29, 1969, at Fort Peck, Montana. The Acting State Director was represented by Mr. Garry Fisher and Mr. Richard K. Aldrich, Office of the Solicitor, Department of the Interior, Billings, Montana, and the Respondent was represented by Mr. Larry Juelfs, Montana Legal Services, P.O. Box 368, Wolf Point, Montana. 3/

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2/ The September 18 notice was amended at a preliminary hearing on October 21, 1968.

3/ Mr. Juelfs resigned his position with the Montana Legal Services Association on September 15, 1969. After that date Respondent has been represented by James J. Screanar, Robert L. LaRoche and Jerrold R. Richards of the Montana Legal Services Association.

ALLEGED TRESPASSES IN JANUARY 1968  
(South Penrose Pasture)

The grazing license year was from April 1, 1967, to March 31, 1968. For this period Respondent was licensed in the South Penrose Pasture, a private allotment, as follows:

90 cattle	May 1, 1967 to October 10, 1967
30 horses	April 1, 1967 to November 30, 1967

He was not licensed for the month of January, 1968.

In conducting a routine compliance check of the general area in mid-January, 1968, BLM personnel found unauthorized horses in this pasture. On January 23 and 24, they counted 61 horses in the pasture and gathered and removed 40 of them. The other 21 escaped capture. Respondent signed a certificate of livestock count (Ex. G-10) on January 24, showing 61 horses to be in the pasture. According to BLM Area Manager Wilton A. Peterson, Respondent admitted ownership of the 61 horses shown in the count (Tr. 25). However, Respondent testified that some of the horses were wild and unclaimed by anyone, but he did admit to ownership of 50 of them (Tr. 142, 143). On January 29, Mrs. Walton telephoned the BLM to advise that all but 5 of the remaining horses had been removed from the pasture.

Giving Respondent the benefit of the doubt as to the 11 so-called wild horses, I find trespass violations to have occurred as follows:

50 horses	January 23-24, 1968
10 horses	January 25-27, 1968

ALLEGED TRESPASSES IN SEPTEMBER-OCTOBER 1968  
(South Penrose Pasture)

In the grazing season of April 1, 1968, to March 31, 1969, Respondent was licensed in this pasture as follows:

24 horses	April 6, 1968 through May 13, 1968
36 horses	May 14, 1968 through June 13, 1968
30 horses	July 16, 1968 through January 7, 1969
107 cattle	June 12, 1968 through October 22, 1968

According to the allegations of the notice, Respondent had an excess of 13 horses and 7 cattle in this pasture during September 10 through September 13.

On the morning of September 10, 1968, Mr. Peterson, assisted by three other experienced BLM personnel, counted the livestock in the South Penrose pasture. They tallied 109 cattle with brands registered to Respondent; 4 registered to Respondent's son-in-law, Sherman Jaycox; 1 registered to Respondent's brother, King Walton; and 1 registered to Kennon Stapp (Tr. 61). Excluding Stapp's animal, they tallied a total of 114 cattle which they charged to Respondent (Tr. 64), and in addition, they counted 43 horses on which the brands were not identified (Tr. 61).

Mr. James Nordwick, manager of a neighboring ranch, testified that on August 8, 1968, he helped Respondent brand the cattle in the South Penrose Pasture. At that time they counted 107 cattle out of the corrals after branding (Tr. 108). This was substantiated by the testimony of Donald Zeiger (Tr. 145).

Respondent testified that he claims no cattle bearing brands of Bar over KW or S Bar F (Tr. 128), nor a little band of wild horses that has always been in the pasture. He also testified that on the first Sunday in August he very carefully counted 107 cattle out of a corral into the pasture (Tr. 133-135). He also gathered all of the horses out of the pasture and sold a few and very carefully counted 30 head and put them into the pasture (Tr. 133). He denies any trespasses as alleged here.

There was considerable testimony by several witnesses covering the difficulty encountered in making accurate counts of livestock in this rough terrain unless they are actually corralled.

In view of all the circumstances and giving Respondent the benefit of the doubt with respect to the band of wild horses, I conclude that the BLM failed to prove the allegations of this part of the notice.

ALLEGED TRESPASSES IN SEPTEMBER-OCTOBER 1968  
(Dunn-McNabb Allotment)

At all times relevant to the allegations of the notice, Respondent was not licensed to graze livestock in this allotment.

On September 12, 1968, BLM personnel inspected the Dunn-McNabb allotment and identified by brand 23 cattle belonging to Respondent (Tr. 33, 39). On September 16, 3 horses belonging to Respondent were seen in the allotment (Tr. 33, 34, 39), and on September 17, in addition to the horses, 28 cattle were identified as belonging to Respondent (Tr. 34, 40). Notice of trespass was served on Respondent on this day (Tr. 35). On September 19, they counted 30 cattle and 3 horses identified as Respondent's (Tr. 35, 41), when a trespass notice was again served. On September 23, the BLM personnel again checked the allotment and tallied 11 cattle



belonging to Respondent (Tr. 38, 42). On September 26, they found 14 cattle and 3 horses identified as Respondent's, and on October 2, they found 11 cattle and 5 horses (Tr. 38, 42, 43). The last inspection was made on October 9, at which time all Respondent's livestock had been removed.

The accuracy of these counts are uncontradicted and accordingly I find that trespass violations occurred in this allotment as alleged in the September 18 notice.

### THE NATURE OF THE TRESPASSES

The trespass regulations, 43 CFR, Subpart 9239, make a distinction between violations which are (1) "not clearly wilful" and those which are (2) "clearly wilful, grossly negligent, or repeated." In the first instance, damages for forage consumed are computed at \$2 per animal unit month (AUM) or at the commercial rate if such rate is higher, whereas, in the second instance, damages are computed at \$4 per AUM, or at twice the commercial rate if such amount is the higher (43 CFR 9239.3-2(c)(2)).

In addition to having to pay this considerable difference in damages, a trespass violator in the second category is subjected to having his license or permit suspended, reduced or revoked, or renewal thereof denied (43 CFR 9239.3-2(e)(2)).

The main explanation given for these trespasses is that a neighboring rancher, Mr. John Dunn, has a propriety for throwing open gates and permitting livestock to wander out of their rightful pastures. While this may be an extenuating circumstance, it can hardly be an excuse for the extended periods of time which Respondent has been shown to be in trespass, particularly in the Dunn-McNabb allotment. Upon being notified of trespasses at various times, Respondent could hardly be characterized as being diligent in taking corrective actions. In fact, Mr. Peterson testified of a conversation he had with Respondent on September 12, 1968, when Respondent in effect admitted knowing his livestock were in the Dunn-McNabb allotment (Tr. 32, 33). The last of them were not removed until after October 2.

The BLM introduced evidence of past trespass violations charged to Respondent (Ex. G-9). This evidence shows a series of six relatively minor violations in the years 1950-1953 and ten similar violations in the years 1965-1967.

Considering all the circumstances, I must conclude that the current violations constitute repeated violations, as that term is used in the regulations (see Edmund and Jesse Walton, A-31066 (May 27, 1969)), and

that the repetitive nature, coupled with the demonstrated lack of diligence in taking corrective action, warrants a finding of wilfulness in Respondent's conduct. Clarence S. Miller, 67 I.D. 145 (1960).

### DAMAGES AND PENALTIES

With the finding that the trespass violations constitute repeated and wilful trespasses, the damages must be assessed at \$4 per AUM or twice the commercial rate, whichever is higher (43 CFR 9239.3-2(c)(2)). The undisputed testimony is that the commercial rate for grazing in the area is \$4 per AUM (Tr. 47). Accordingly, damages will be calculated on the basis of \$8 per AUM, as follows:

#### South Penrose Pasture (73% Federal Range) 4/

50 horses x .065 mo. (1/23-1/24) x 73% F.R. = 2.37 AUMs x \$8.00 = \$18.96  
10 horses x .097 mo. (1/25-1/27) x 73% F.R. = 0.71 AUMs x \$8.00 = 5.68

Total        \$24.64

#### Dunn-McNabb Allotment (46% Federal Range) 5/

23 cattle x .167 mo. (9/12-9/16) x 46% F.R. = 1.77 AUMs x \$8.00 = \$14.16  
3 horses x .533 mo. (9/16-10/1) x 46% F.R. = 0.74 AUMs x \$8.00 = 5.92  
28 cattle x .067 mo. (9/17-9/18) x 46% F.R. = 0.86 AUMs x \$8.00 = 6.88  
30 cattle x .100 mo. (9/19-9/21) x 46% F.R. = 1.38 AUMs x \$8.00 = 11.04  
11 cattle x .167 mo. (9/21-9/25) x 46% F.R. = 0.83 AUMs x \$8.00 = 6.64  
14 cattle x .033 mo. (9/26) x 46% F.R. = 0.21 AUMs x \$8.00 = 1.68  
11 cattle x .200 mo. (9/27-10/2) x 46% F.R. = 1.01 AUMs x \$8.00 = 8.08  
5 horses x .033 mo. (10/2) x 46% F.R. = 0.08 AUMs x \$8.00 = 0.64

Total        \$55.04

Total Damages        \$79.68

The BLM recommended a 30 percent reduction in Respondent's grazing license for a period of three years. This is the same recommendation that was made at the initial hearing in the case of Edmund and Jessie Walton, *supra*.

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4/        Tr. 44  
5/        Tr. 46

On appeal in that case the Department reduced the initial findings from wilful trespass to repetitive trespass and adjudged a penalty of a reduction in grazing privileges of 10 percent for one year. Using that case as a guideline, I believe the proper penalty in this case, in view of the repetitive and wilful nature of the trespasses, should be a 20 percent reduction in grazing privileges for a period of two years.

ORDER

The District Manager is directed to refuse to issue Respondent any license or permit authorizing the grazing of livestock upon the Federal range until the damages of \$79.68, herein found to be due, are paid, and thereafter to issue a license or permit to Respondent for no more than 80 percent of his base property qualifications for a period of two years.

/s/

L. K. Luoma  
Hearing Examiner

Enclosure:  
Statement of Appeal Procedure

